STATE OF MICHIGAN

COURT OF APPEALS

LISA MARIE HERFURTH-WICKHAM,

Plaintiff-Appellant,

V

PHILLIP ALEXANDER HERFURTH,

Defendant-Appellee.

UNPUBLISHED
April 13, 2006

No. 264574
Genesee Circuit Court
LC No. 00-220286-DM

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the orders transferring temporary physical custody of the minor child to defendant. We vacate the lower court order and remand for further proceedings consistent with this opinion.

Plaintiff first contends that the trial court erred by changing physical custody of the minor child without conducting an evidentiary hearing, and rendering a decision contrary to the requirements of MCL 722.23. We agree. Three different standards of review are applicable in child custody proceedings. A trial court's choice, interpretation, or application of the existing law is reviewed for clear legal error. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001), citing *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Findings of fact are reviewed under the great weight of the evidence standard and this Court will uphold the trial court's factual findings unless "the evidence clearly preponderates in the opposite direction." *Id.* A trial court's determination on the issue of custody and discretionary rulings are reviewed for an abuse of discretion. *Id.* Because plaintiff did not assert her due process claims below, this issue is unpreserved. An unpreserved, constitutional error is forfeited unless there is a showing of plain error that affected substantial rights. *In re Osborne*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

An award of child custody can be modified, pursuant to MCL 722.27(1)(c), for "proper cause shown" or "[a] change of circumstances" establishing the modification to be in the child's best interest. MCL 722.27(1)(c); *Foskett, supra*, at p 5. Before custody can be changed, an evidentiary hearing must be conducted. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). The individual seeking the change in custody must first establish proper cause or a change in circumstances before both the existence of an established custodial environment and the best interest factors may be considered. *Vodvarka v Grasmeyer*, 259 Mich

App 499, 508-509; 675 NW2d 847 (2003). The burden of proof is always upon the party seeking the modification. *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991).

To constitute a change of circumstances or proper cause substantiating a consideration of custody change, there must have been a change in conditions relevant to custody since the entry of the last custody order which has had or could have a significant impact on the child's well-being. *Vodvarka, supra,* p 513. The determination of a change of circumstances or proper cause is based on the statutory best interest factors, on a case-by-case basis. *Id.* at 514. Defendant alleged a significant change in circumstances asserting constant interference by plaintiff in defendant's relationship with the minor child and the denial of parenting time by plaintiff.

While defendant demonstrated a proper cause or a sufficient change of circumstances to evaluate the current custodial order, the trial court first erred by failing to make, initially, a determination regarding the existence of an established custodial environment. Whether an established custodial environment exists comprises a question of fact that must be addressed by a trial court before it makes any determination regarding what is in a child's best interest. *Mogle v Scriver,* 241 Mich App 192, 197; 614 NW2d 696 (2000). Because the trial court failed to address whether there existed an established custodial environment, the proper standard of proof to be applied, either clear and convincing evidence or a preponderance of the evidence, cannot be determined.

In addition, a trial court must consider all of the factors contained in MCL 722.23, applying the correct burden of proof, in order to determine the best interests of a child in a custody dispute. "A trial court must consider and explicitly state its findings and conclusions with respect to each of these factors." *Foskett, supra,* at p 9. The trial court failed to follow this very clear mandate. While the trial court posed inquiries to defendant regarding his employment and living situation and sought information regarding what school the minor child would be attending if he were awarded custody, this line of inquiry is a far cry from engaging in a meaningful review and determination of each of the best interest factors.

In accordance with MCL 722.25, a custody dispute is required to be resolved in the best interest of the minor child, with the trial court making determinations based on the best interest factors elucidated in MCL 722.23. While the trial court is not required to comment on every matter in evidence or declare its acceptance or rejection of every proposition asserted, nor attribute equal weight to each factor, it must still "evaluate each of the factors contained in the Child Custody Act, MCL 722.23 . . . and state a conclusion on each, thereby determining the best interests of the child." *Thompson v Thompson,* 261 Mich App 353, 363; 683 NW2d 250 (2004) (citations omitted). Failure to do so constitutes clear legal error.

The trial court made no reference to best interest factors (a), (b), (d), (f) or (g). The trial court did not evaluate the parties' relative capacities to provide for necessities for the minor child, as required by MCL 722.23(c), other than to verify defendant's employment. The trial court failed to investigate the permanence of the family unit in the existing or proposed custodial homes, in accordance with MCL 722.23(e), other than to verify defendant's remarriage and the presence of other children in his home. Knowing which school the minor child would attend in Michigan does not constitute the evaluation of the home, school and community record of the minor child required by MCL 722.23(h).

The trial court ruled that a change of custody was necessitated based primarily on defendant's presentation of evidence on MCL 722.23(j). However, the trial court's failure to make determinations on each of the factors suggests that the trial court was more concerned with issues existing between the parties and plaintiff's failure to comply with a prior court order, rather than the proper focus of what would best serve the well-being and interests of the minor child involved. *Usendek v Usendek*, 8 Mich App 385, 390; 154 NW2d 627 (1967), citing *Remus v Remus*, 325 Mich 641, 643; 39 NW2d 211 (1949). Although defendant may, in accordance with the trial court's observation, be capable of caring for the minor child, that does not comprise the issue before the trial court. Rather, the issue, when properly framed, is whether it is in the best interests of the minor child to have defendant assume primary custodial responsibility for the child. That determination cannot be made based on the record as it currently exists.

Recognizing the trial court's authority, pursuant to MCL 722.27(1)(e), to "take any other action considered to be necessary in a particular child custody dispute," even if the court determined an emergency situation was existing necessitating a change of custody, "[s]uch a determination . . . can only be made after the court has considered facts established by admissible evidence – whether by affidavits, live testimony, documents, or otherwise." *Mann, supra*, p 533. In this regard, while it is not improper for the trial court to consider the investigative results obtained by the Michigan State Police and Child Protective Services, its ultimate findings must be based on competent evidence adduced at a hearing. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). The trial court's implication that it would adopt the determinations of the investigative agencies concerning the allegations of molestation of the minor child, and allow those determinations to dictate the final disposition of its award of temporary custody to defendant, without an independent determination by the trial court of the best interest factors, was in error. *Brown v Loveman*, 260 Mich App 576, 597; 680 NW2d 432 (2004).

Plaintiff further claims that the notice of the proceedings did not sufficiently apprise her that custody would be at issue. We agree. In civil cases, due process requires notice of the nature of the proceeding. *Vicencio v Ramirez*, 211 Mich App 501, 504; 536 NW2d 280 (1995). Due process notice requirements are "satisfied when interested parties are given notice through a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond." *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995). The order directing plaintiff to appear for hearing fails to indicate that the purpose of the hearing would be to take evidence in order to determine whether a change of custody was in the best interest of the minor child. On its face, the order, while giving notice of the pendency and date for a hearing, implies only that it is to enforce summer parenting time without any reference to the conduct of a change of custody hearing. As such, the notice was not sufficient to apprise plaintiff of the nature of the proceeding to be conducted. In addition, the order of July 12, 2005, effectively deprived plaintiff of any parenting rights by effectuating both a temporary change of custody and taking plaintiff's rights to parenting time with the minor child "under advisement," without any interim provision for plaintiff to exercise any parental rights with the minor child. Thus, on this record we conclude that plaintiff has shown plain error affecting her substantial rights. In finding error, however, we offer no safe harbor for plaintiff's deliberate violation of the trial court's directive that she personally appear with the minor child for the July 2, 2005 hearing. While plaintiff's failure to appear may certainly be addressed by the trial court, it is not appropriately addressed by holding a truncated hearing on the question of custody.

Plaintiff next asserts that the trial court erred in precluding her appearance by telephone at the hearing conducted July 12, 2005. Plaintiff further contends the trial court erred in allowing defendant to provide testimony that was speculative and constituted hearsay. Since we remand for a new evidentiary hearing, we need not address these questions. We do note, however, that in general, "[t]estimony must be taken in person," and that a trial court may permit testimony by other means only "in extraordinary circumstances." MCR 3.210(A)(4). We question whether the mere inconvenience of returning to Michigan for the hearing constitutes the "extraordinary circumstances" required by the court rule.

Plaintiff next contends the trial court erred in permitting defendant to offer his own opinion as to the basis of communication problems between the parties. We agree. In general, lay witnesses should be confined to a recitation of facts. *Agee v Williams*, 17 Mich App 417, 422-423; 169 NW2d 676 (1969). The critical question is whether any proffered testimony will aid the factfinder in making a ruling or decision in the case. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990). However, purely speculative testimony should be excluded. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). The trial court could have properly questioned defendant regarding incidents or experiences which demonstrated communication problems between the parties, but it clearly erred by permitting defendant to merely speculate regarding the basis or motives for plaintiff's alleged behavior.

Plaintiff last asserts that the trial court erred by permitting defendant to testify to statements, made to him by the minor child, that purported to communicate statements made by the plaintiff. We agree that the admission of such evidence was in error. Hearsay is defined as a statement, other than one made by a declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. MRE 801(c). In contrast, "[s]tatements offered to show that they were made or to show their effect on the listener are not hearsay." *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998). Defendant's recitation was intended to prove the truth of the matter asserted, namely, that plaintiff was engaged in behaviors to intentionally interfere with his relationship with the minor child. As such, they comprised inadmissible hearsay. While defendant contends they fall within hearsay exceptions, including MRE 803(1) or (2), the assertion is not accompanied by any proofs to indicate circumstances that would transform or make the statements admissible.

For the reasons stated, *supra*, we vacate the trial court's orders for temporary custody and remand to the trial court for an evidentiary hearing on the issue of custody. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder